No. 19

Supreme Court of the United States

OCTOBER TERM, 1954

NATIONAL UNION OF MARINE COOKS AND STEWARDS, a voluntary association, *Petitioner,*

vs.

GEORGE ARNOLD, *et al.,* *Respondents.*

BRIEF OF RESPONDENTS

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INDEX

TABLE OF CASES

Page

TEXTBOOKS

STATUTES

CONSTITUTIONS

WASHINGTON SUPREME COURT RULES

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BRIEF OF RESPONDENTS

OPINIONS BELOW

The State Court action under review (R. 53) is unreported. Four opinions have been published on other issues (36 Wn.(2d) 557, 219 P.(2d) 121; 41 Wn.(2d) 22, 246 P.(2d) 1107; 42 Wn.(2d) 648, 257 P.(2d) 629; 144 Wash. Dec. 165, 265 P.(2d) 1051).

JURISDICTION

We do not find that the question now raised by petitioner under the Equal Protection Clause of the Fourteenth Amendment was ever "specially set up or claimed" below. So far as we find, the Equal Protection Clause was not mentioned, except in a brief filed June 13, 1952 (R. 26, at 28). The question there raised is not the question argued now by petitioner.

ADDITIONAL STATEMENT OF THE CASE

This action is one to recover damages for libel, a common law tort. *Arnold v. National Union of Marine*

Cooks and Stewards, 36 Wn.(2d) 557, 219 P.(2d) 121, and 144 Wash. Dec. 165, 265 P.(2d) 1051. Special damages were not alleged. *Arnold v. National Union of Marine Cooks and Stewards*, 36 Wn.(2d) 557, 219 P.(2d) 121. The case was tried to a jury which returned a verdict awarding $5,000 to each of the 95 plaintiffs who are respondents here. September 4, 1951, judgment was entered on the verdict. This judgment runs against petitioner and Joseph Harris (R. 1-8). Petitioner and Harris appealed but did not supercede (R. 12) and the judgment was therefore enforceable pending appeal. Revised Code of Washington (R.C.W.), Section 4.88.-060, Laws of 1893, C. 61, Section 7; Rules on Appeal, Vol. 34A Wash. Reports, Rule 25, p. 27; *Cunningham v. Mitchell*, 126 Wash. 294, 218 Pac. 386; *Ryan v. Plath*, 18 Wn.(2d) 839, 140 P.(2d) 968.

In supplemental proceedings looking toward enforcement of the judgment, a receiver was appointed and petitioner was directed to transfer certain bonds to the receiver, all as specifically authorized by statute. R.C.W., Section 6.32.290, Laws of 1893, C. 133, Section 28; and R.C.W., Section 6.32.080, Laws of 1893, C. 133, Section 8. It was not proposed that the receiver disburse the proceeds of these bonds, or distribute the bonds, but that the bonds be held by the receiver pending the outcome of petitioner's appeal from the money judgment (R. 49). It has never been claimed that petitioner did not possess the bonds at the time the order directing transfer was entered. Petitioner failed to comply with the order, and, after notice and hearing, was adjudicated in contempt (R. 9). Upon appeal the con-

tempt adjudication was affirmed and the Court ordered that the appeal from the money judgment be dismissed unless petitioner purge itself within 15 days (*Arnold v. National Union of Marine Cooks and Stewards*, 42 Wn. (2d) 648, 257 P.(2d) 629). Petitioner having failed to purge itself, the appeal was dismissed July 3, 1953 (R. 53).

Petitioner appealed to this Court from the decision of the State Supreme Court affirming the adjudication of contempt and directing that petitioner's appeal from the money judgment be dismissed unless it purge itself within 15 days. The appeal to this Court was dismissed November 16, 1953, for lack of a substantial federal question. *National Union, etc., v. Arnold, et al.*, 346 U.S. 881, 98 L.Ed. (Advance p. 80), 74 S.Ct. 136.

While petitioner and Harris had taken joint appeals (R. 50, 19, 21, 39), the Washington Supreme Court refused to dismiss the Harris appeal and separately docketed his appeal for argument (R. 52). Upon the Harris appeal the money judgment was affirmed February 2, 1954. *Arnold v. National Union of Marine Cooks and Stewards*, 144 Wash. Dec. 165, 265 P.(2d) 1051.

We believe the problem presented to the Washington Supreme Court may most appropriately be shown by excerpts from affidavits submitted to that Court.

April 2, 1952, there was filed an affidavit reading in part as follows (R. 13-14):

> "Said voluntary association has altogether failed and refused, and still fails and refuses, to deliver to said receiver said bonds or any part of said

bonds, and has given no explanation to said receiver or to the court or to said plaintiffs in said cause or their counsel for its failure to comply with said order.

"The failure of said association to comply with said order is frustrating enforcement of the judgment which is the subject of the above appeal and is frustrating the receivership created and existing in said case in said superior court by virtue of said order of said court.

"On or about the 4th day of April, 1952, said superior court made its order adjudicating said association in contempt of court for failure to deliver said bonds and further adjudicating that said defendants' contemptuous conduct frustrates the enforcement of said judgment and frustrates the receivership created by the court's order.

"Said bonds are, and at all times mentioned herein, have been, situated in San Francisco, California. Said bonds are in the custody and under the control of officers of said association who reside in California and are beyond the jurisdiction of said superior court. Said association has no substantial assets within the jurisdiction of said superior court and its only assets within such jurisdiction consist of furniture and equipment used in its offices and hiring hall in Seattle, Washington. Said superior court is unable to exercise such coercive power against such association as to compel delivery of said bonds and said association is contemptuously ignoring the aforementioned orders of such superior court."

June 12, 1953, respondents filed a further affidavit reading in part as follows (R. 45):

"The appellants have altogether failed to de-

posit Government bonds in the amount of $298,000.00, or any other securities, money, or other property with the receiver appointed by the Superior Court of the State of Washington, and have not, in whole or in part, purged themselves of the contempt mentioned in the opinion and order entered upon the appeal to this Court in the above-entitled cause, under number 32180. In said cause number 32180, before this Court, the remittitur went down May 26, 1953, and has never been recalled.

"An emergency exists because the appellant union is rapidly dissipating its assets. On September 26, 1951, said appellant owned cash and liquid securities in the approximate amount of $360,011.58, according to its own financial report. According to a report published by said appellant under date of March 13, 1953, said appellant, during 1952, expended approximately $200,000.00 more than it received and its 'cash assets' (broadly described in said report as 'cash, investments, etc.') amounted to only $90,389.00 at the end of 1952. All of its assets of substantial value are in California and two California courts have refused to entertain suit on the Washington judgment while this appeal is pending. The other appellant has no known assets and certainly has no assets of material value in relation to the amount of the judgment herein. Nothing whatsoever has been paid upon said judgment."

These allegations are undenied, except that petitioner claims that the undenied reduction in assets was not "dissipation" (R. 37-38).

SUMMARY OF ARGUMENT

The Superior and Supreme Courts of the State of Washington are constitutional courts with inherent powers to discharge their duties as trial and appellate courts of general jurisdiction. The Legislature may not impair these powers and the failure of the Legislature specifically to authorize the action taken in the instant case does not negative the power of the Court to take such action. Washington State Constitution, Article IV; *Blanchard v. Golden Age Brewing Co.*, 164 Wash. 140, 2 P.(2d) 79.

Petitioner's due process rights were exhausted by jury trial; "Due process does not comprehend the right of appeal." *District of Columbia v. Clawans*, 300 U.S. 613, 627, 81 L.Ed. 843, 847, 57 S.Ct. 660. The basis upon which the court in *Howey v. Elliott*, 167 U.S. 409, 42 L. Ed. 215, 17 S.Ct. 841, distinguishes *Allen v. Georgia*, 166 U.S. 138, 41 L.Ed. 949, 17 S.Ct. 525, carries the clear implication that denial of a right of appeal for contempt is not *ipso facto* violative of the Due Process Clause. Restriction of a right of appeal for contempt may be reasonable in its impact and then raises no question under the Due Process Clause.

The contempt occurred in the same case as the appeal dismissal. Petitioner did nothing to purge itself. There was no possible action reasonably calculated to vindicate the Court's authority and coerce compliance except the conditional appeal dismissal. The Fourteenth Amendment does not force the Washington Court to accept petitioner's proposal that it be allowed to prosecute its appeal, use the pendency of the appeal to defeat

action upon the judgment in California, meanwhile dissipating its assets to make the judgment an empty right. The justification for dismissal of an escaped criminal's appeal justifies dismissal here.

If petitioner had faith in its appeal it would not reduce the judgment to sham by contumacious dissipation of its own assets. By giving such an admission conclusive effect no due process right is violated. *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 53 L.Ed. 530, 29 S.Ct. 370.

Petitioner was actually heard upon the appeal through its co-appellant Harris whose only interest in the appeal was to act as virtual representative of petitioner. *Arnold v. National Union of Marine Cooks and Stewards,* 144 Wash. Dec. 165, 265 P.(2d) 1051.

The equal protection claim now argued was never urged before the state courts and is not available to petitioner. If it is available to petitioner, there is no substance to the claim because there is nothing to suggest that all appellants who place themselves in petitioner's position will not be treated in exactly the same way as petitioner, nor that the same principle applied to petitioner will not be applied to all appellants. The fact that some people are allowed to appeal and some people are not does not deny equal protection, unless arbitrary distinctions are imposed.

The federal preemption argument petitioner proposes to make to the State Supreme Court is without substance. This is a common law tort action for libel, and the remedy does not overlap the National Labor Relations Board remedy. The instant case is further

removed from the preempted field than *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 657, 98 L.Ed. (Advance, p. 686), 74 S.Ct. 833.

ARGUMENT

The Action Taken by the State Supreme Court Was Within Its Inherent Powers

It is contended by petitioner that the dismissal is not authorized by State law. This suggestion is based upon the theory that the dismissal is not authorized by the State statutes governing appeals and contempts.

The Supreme and Superior Courts of the State of Washington are constitutional courts. Washington State Constitution, Article IV. They have the inherent powers of courts of general jurisdiction and the Legislature may not impair their powers to discharge their duties as constitutional courts. *Blanchard v. Golden Age Brewing Co.*, 164 Wash. 140, 2 P.(2d) 79. Many Washington decisions defer to legislative regulation of court business and leave the impression that the Washington courts have no greater immunity from legislative interference than such courts as are products of legislative enactment. The *Blanchard* case makes clear that judicial deference to legislative regulation of the Washington Superior and Supreme Courts in the discharge of their judicial duties is a matter of comity and that those Courts need not submit to any such regulation, and will not submit to any that is unreasonable.

The action of the Washington Supreme Court was designed to vindicate the authority of the courts and effectuate the judgment and order of the Superior

Court; it was designed to effectuate due process upon the plea of respondents who were trying to collect their judgment by due process of law. These are the proper functions of contempt proceedings. *Texas v. White (In re Chiles)*, 89 U.S. (22 Wall.) 157, 22 L.Ed. 819. Courts have inherent power to effectuate their judgments; courts have inherent power to command respect for their orders. 14 Am. Jur. 370, Sec. 171; 14 Am. Jur. 373, Sec. 174. Therefore, the Legislature could not have divested the Supreme Court of the State of the power to act as it did, even if the Legislature had expressly prohibited dismissal of appeals under such circumstances as we find here. Of course, the Legislature has not done this.

A similar argument was made in *MacPherson v. MacPherson* (Calif.) 89 P.(2d) 382, where an appellant contended a statute providing penalties for contempt limited the power of the Court, and the Court said:

> "This statute will not be construed to infringe upon the court's inherent powers to ignore the demands of litigants who persist in defying the legal orders and processes of this state."

The Washington Supreme Court has in the past dismissed appeals in criminal cases where the appellant became a fugitive from justice during the pendency of his appeal. *State v. Handy*, 27 Wash. 469, 67 Pac. 1094; *State ex rel. Soudas v. Brinker*, 128 Wash. 319, 223 Pac. 615. And the appeal of a mother deprived of custody of her children was dismissed because, pending the appeal, she contumaciously concealed them. *Pike v. Pike*, 24 Wn.(2d) 735, 167 P.(2d) 401. Statutes did not authorize these dismissals.

It is plain that the Washington Supreme Court is not confined to dismissals supported by statutory authority.

Petitioner Was Not Denied Procedural Due Process

Petitioner was given ample notice and a jury trial with full right to be heard by an impartial jury and judge. This exhausted petitioner's procedural rights under the Due Process Clause, because, "Due process does not comprehend the right of appeal." *District of Columbia v. Clawans*, 300 U.S. 613, 627, 81 L.Ed. 843, 847, 57 S.Ct. 660; *Reetz v. Michigan*, 188 U.S. 505, 47 L.Ed. 563, 23 S.Ct. 390; *Pittsburgh C. C. and St. Louis R. R. Co. v. Backus*, 154 U.S. 421, 38 L.Ed. 1031, 14 S.Ct. 1114; *McKane v. Durston*, 153 U.S. 684, 38 L.Ed. 867, 14 S.Ct. 913; 12 Am. Jur. 328, Section 638.

Mr. Justice White in *Hovey v. Elliott*, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841, strongly intimates that denial of a right of appeal for contempt would not be violative of the Due Process Clause of the Fourteenth Amendment:

> "Nor is there force in the contention that *Allen v. Georgia*, 166 U.S. 138, impliedly sustains the validity of the authority exercised by the court of the District of Columbia in the matter now under consideration. In the *Allen* case the accused had been regularly tried and convicted, and the error complained of was that the Georgia supreme court had violated the Constitution of the United States in refusing to hear his appeal because he had fled from justice. In affirming the judgment of the supreme court of Georgia, the court called attention to the distinction between the inherent right of defense secured by the due process of law clause of

the Constitution and the mere grace or favor giving authority to review a judgment by way of error or appeal. It said (p. 140):

"'Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the supreme court of a state has acted in consonance with the constitutional laws of a state and its own procedure it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference.'

"The same view had been previously announced in *McKane v. Durston*, 153 U.S. 687, where the court said:

"'An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.'

"Whether in the exercise of its power to punish for a contempt a court would be justified in refusing to permit one in contempt from availing himself of a right granted by statute, where the refusal did not involve the fundamental right of one

summoned in a cause to be heard in his defense, and where the one in contempt was an actor invoking the right allowed by statute, is a question not involved in this suit. The right which was here denied by rejecting the answer and taking the bill for confessed because of the contempt involved an essential element of due process of law, and our opinion is therefore exclusively confined to the case before us."

In *Allen v. Georgia,* discussed by Mr. Justice White, Allen had been captured after dismissal of his appeal and resentenced to death. It would seem that Allen had a stronger claim under the Due Process Clause than does petitioner in the instant case. We have tried and fail to see how a reversal of the Washington Supreme Court could be reconciled in principle with the *Allen* case.

Petitioner speaks of the State Court appeal as a matter of right and not of favor. This can be confusing (See *Skirven v. Skirven* (Md.) 140 Atl. 205) and suggests "the tyranny of labels" (*Palko v. Connecticut,* 302 U.S. 319, 82 L.Ed. 288, 58 S.Ct. 149). Even if we assume that the distinction between matters of right and matters of favor has value for some purposes, the right to a state court appeal, as we have shown, is not a right accorded by the Due Process Clause of the Fourteenth Amendment. Under Washington law it is a right qualified by the court's inherent powers. And the degree to which this "right" is qualified is not a Federal question.

In *People v. Genet,* 59 N.Y. 82, 17 Am. Rep. 315, the Court of Appeals of New York made this provocative

comment upon the absoluteness of the right of an escaped criminal to appeal:

> "The provisions of the statutes giving to defendants in criminal cases the right to make a bill of exceptions are not so absolute as to displace all the other principles which belong to criminal proceedings, but must be taken in subordination to them.
>
> "We think they do not require the courts to encourage escapes and facilitate the evasion of the justice of the State by extending to escaped convicts the means of reviewing their convictions."

As Mr. Justice White intimated in his discussion of the *Allen* and *McKane* cases, in *Hovey v. Elliott, supra*, since the Fourteenth Amendment does not protect the right of appeal, the right may be taken away, in proper cases, because of contempt. A case is a proper case if, under all of the circumstances, the action is not arbitrary, but has reasonable justification.

It Was Reasonable Under All of the Circumstances to Dismiss Petitioner's Appeal

Respondents asserted a claim against petitioner in the Washington courts and sought due process of law. After verdict and judgment petitioner appealed but did not supersede. Respondents then asked that due process steps be taken toward enforcement of the judgment, and the Superior Court, a constitutional court of general jurisdiction, acting within now unquestionable power, in February of 1952, appointed a receiver and directed transfer to the receiver of $298,000.00 in United States bonds (R. 14-16). The receiver was not authorized to take over the operation of petitioner's business or to take possession of any assets

other than the bonds (R. 16). There was no threat that the bonds or their proceeds would be transferred to respondents during the pendency of petitioner's appeal. It was expressly proposed by respondents that the receiver simply preserve these assets until final outcome of the case (R. 49).

The order appointing a receiver and directing transfer of assets was made in proceedings supplemental to execution. These proceedings are not independent proceedings, but are merely auxiliary to and a continuation of the original action. *Arnold v. National Union of Marine Cooks and Stewards,* 142 Wash. Dec. 590, 257 P. (2d) 629, and cases cited, appeal dismissed, 346 U.S. 881, 98 L.Ed. (Advance, p. 80), 74 S.Ct. 136. The Superior Court had jurisdiction not only to enter the money judgment against petitioner but to make its orders in supplemental proceedings. *Arnold v. National Union of Marine Cooks and Stewards, supra.*

Petitioner transferred no bonds to the receiver and gave no explanation of its failure to do so, except so far as its appellate attack upon the validity of the order may be deemed an explanation. It then proceeded to reduce its cash and liquid securities from $360,011.58 September 26, 1951, very shortly after entry of judgment, to $90,389.00, at the end of 1952 (R. 45). It is apparent that by its contemptuous failure to comply with the Superior Court's order petitioner has to a very substantial degree defeated enforcement of the money judgment.

The Superior Court accorded petitioner a hearing and adjudicated petitioner in contempt of court. There

was little the Superior Court could do to coerce compliance with its order because practically all of the assets of petitioner were situated in the State of California and all of its officers with authority to transfer the assets were outside the jurisdiction of the Washington Court. In this posture of affairs respondents moved to dismiss petitioner's appeal from the money judgment. The motion was not acted upon until the contempt itself was reviewed by the State Supreme Court. Upon affirmance of the contempt adjudication, petitioner was given fifteen days within which to purge itself on pain of dismissal of its appeal. It did not purge itself and its appeal was dismissed.

The action of the State Supreme Court was reasonably calculated to further proper interests of the State. The State had an interest in the discharge of its duty to grant effective due process of law to respondents. It has a general interest in commanding respect for orders and decrees of its courts and in penalizing disrespect. Under the circumstances the only coercive action available to the State Court was dismissal of petitioner's appeal. Petitioner was proposing, in effect, that it be allowed to prosecute its appeal and use the pendency of the appeal to defeat action upon the judgment in California, meanwhile dissipating its assets so that, should it lose its appeal, the judgment would be uncollectible. We can scarcely believe that the Fourteenth Amendment compels the Supreme Court of the State of Washington to accept such a proposition. We submit that the action taken by the State Supreme Court was not "an arbitrary exercise of the powers of government, unrestrained by the established principles of pri-

vate rights and distributive justice." *Bank of Columbia v. Okely*, 4 Wheat. 235, 4 L.Ed. 559. We take it that the essential of due process is reasonableness. *West Coast Hotel Company v. Parrish*, 300 U.S. 379, 391, 81 L.Ed. 703, 708, 57 S.Ct. 578, 108 A.L.R. 1330. It would seem that nothing that is reasonable and tends to serve a legitimate state interest could violate the Due Process Clause of the Fourteenth Amendment. We understand that the Fourteenth Amendment perpetuates principles identified with the due process guaranty of the Magna Charta, but this does not condemn procedural novelties consistent with those principles. *Twining v. New Jersey*, 211 U.S. 78, 53 L.Ed. 97, 29 S.Ct. 14. If the Washington Court's action is novel, it is novel only in a limited sense, and surely does violence to no historical due process principle.

In *Allen v. Georgia, supra*, Allen was held to have forfeited his right of review by escaping during the pendency of review proceedings. This escape did not make the case in any real sense moot because Allen was later captured and resentenced to death. This Court commented that it might have pursued a different course in the case, but that Allen had not been deprived of any fundamental right guaranteed by the Fourteenth Amendment. The Court said:

> "By escaping from legal custody he has, by the laws of most, if not all of the states, committed a distinct criminal offense; and it seems but a light punishment for such offense to hold that he has thereby abandoned his right to prosecute a writ of error, sued out to review his conviction. Otherwise he is put in a position of saying to the court: 'Sus-

> tain my writ and I will surrender myself, and take my chances upon a second trial; deny me a new trial and I will leave the state, or forever remain in hiding.' We consider this as practically a declaration of the terms upon which he is willing to surrender, and a contempt of its authority to which no court is bound to submit."

The Court referred to *Commonwealth v. Andrews*, 97 Mass. 543, in which it was held that a convicted person who escaped during the pendency of his case in the appellate court could not be heard by attorney and would be deemed to have waived his right to be heard.

This course of reasoning more than justifies the action taken by the Washington Supreme Court in the instant case. In the *Allen* case, Allen did nothing that necessarily defeated the Georgia court. In fact, it turned out that he was captured and resentenced to death, and the sentence presumably was carried into effect. Petitioner in the present case has now dissipated its assets so that there is a greater probability that the Washington courts have been completely and permanently frustrated.

In *Bronk v. Bronk* (Fla.) 35 So. 871, a man had been taken into custody under a writ of *ne exeat* in a civil action for maintenance and alimony brought by his wife. He escaped and left the jurisdiction. The court, declining to entertain and hear certain assignments of error, said:

> "Doubtless the general rule is that a party is not deprived of any strict legal right to be heard by placing himself in contempt of the court, especially if there be other means available by which the court may enforce its orders. *Hovey v. Elliott*, 167 U.S.

469, text 428, 17 S.Ct. 841, 42 L.Ed. 215, and cases there cited. But the right to be heard upon appeal or writ of error has not been held to be one which a party cannot deprive himself of by his voluntary act of putting himself in contempt of the court by escaping from custody and evading the power and processes of the law and of the courts. It is distinctly held in the above cited case, on pages 443 and 444, 167 U.S., p. 854, 17 S.Ct., 42 L.Ed. 415, that such a question was not involved in that suit. In this state it is decided that an appellate court will refuse to hear a criminal case on writ of error where the plaintiff in error has escaped, and is not within the control of the court below, either actually by being in custody, or constructively by being out on bail. *Woodson v. State*, 19 Fla. 549. This case has been repeatedly followed by this court. The principle of those cases applies here."

The cases involving contemptuous violation by appellants of decrees concerning custody of children seem directly analogous and the reasoning in those bases bears directly upon the instant case.

In *Casebolt v. Butler* (C.A. Ky.) 194 S.W. 305, the Court said, in refusing *mandamus* to compel certification of a bill of exceptions for an appellant who violated a custody decree and removed a child from the jurisdiction of the Court:

"If his appeal on a proper record should be brought to this Court and the ruling of Judge Butler affirmed, there is no way by or through which the judgment of this Court could be enforced. If the judgment was adverse to Casebolt, he would doubtless continue to keep the custody of the child and remain outside the jurisdiction of the Court,

but if the judgment of this court was favorable to him, he would probably return with the child and submit himself to the jurisdiction of the Court. In other words, the attitude of Casebolt is that: 'If you decide the case in my favor, well and good, but, if you do not, I will keep the child out of your reach, so that, no matter what the decision of the Court may be I will continue to have the custody of the child.' Under circumstances such as these we are clearly of the opinion that Casebolt should not be permitted to thus trifle with the Court and so conduct himself as to make its orders and judgments a mere nullity unless he voluntarily sees proper to obey them.

"The argument is made in his behalf that the trial court might refuse while he was in contempt to grant a favor or refuse to do something concerning which it might exercise a discretion, but that here, as the statute gives him the right of appeal, his contempt does not excuse the trial judge from giving him that which under law he has the right to demand.

"It is true that the statute gives to Casebolt the right to appeal from the order entered by Judge Butler, but this right he has forfeited by his own voluntary and willful acts. He is here asking the recognition of a right that he conceives will be beneficial to him, and at the same time is saying to the Court: 'If I should be mistaken and my appeal should not change the status of things, I will pay no attention to your order or judgment.'

"If a defendant, who is by statute given the right to prosecute an appeal, can forfeit this right by escaping jail and putting himself outside the jurisdiction of the Court so that an adverse judgment would not affect him, we are unable to perceive why

a party to a civil suit may not likewise forfeit his right to appeal by voluntarily refusing to obey the order of Court from which he desires to prosecute an appeal, and also by expressly putting himself in the position in which he would not be amenable to the processes of the Court in the event that judgment was against him."

In *MacPherson v. MacPherson* (Calif.) 89 P.(2d) 382, the Supreme Court of California unanimously said:

"In secluding the children in a foreign country and alienating them, appellant violated not only his agreement with plaintiff and the provisions of interlocutory and final decrees of divorce, but he has also wilfully and purposely evaded legal processes and contumaciously defied and nullified every attempt to enforce the judgments and orders of the California courts, including the very order from which he seeks relief by this appeal. Such flagrant disobedience and contempt effectually bar him from receiving the assistance of an appellate tribunal. A party to an action cannot, with right or reason, ask the aid and assistance of the court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of the state."

The appeal was dismissed.

In *Lindsay v. Lindsay*, 99 N.E. 608, 255 Ill. 442, a mother violated a decree awarding custody of her child to another, and removed the child from the jurisdiction. She attempted to review the decree in the Illinois Supreme Court. The Court said she had no right to be heard:

"The weight of authority seems to be that a

party in contempt is not entitled to prosecute or defend an action, when the nature of his contempt is such as to hinder and embarrass the due course of procedure in the cause."

In *Henderson v. Henderson* (Mass.) 107 N.E.(2d) 773, the Court said of an appeal by a party who contemptuously removed a child from the jurisdiction:

> "The question somewhat resembles that presented by a defendant in a criminal case whose conduct in escaping custody after conviction has been held to be a waiver of all right to seek a reversal in appellate proceedings. *Commonwealth v. Andrews*, 97 Mass. 543; *Allen v. Georgia*, 166 U.S. 138, 17 S.Ct. 525, 41 L.Ed. 949."

The Court gave appellant 30 days to purge herself on pain of dismissal of her appeal.

In *Knoob v. Knoob* (Calif.) 218 Pac. 568, another custody case, the Court said:

> "But one conclusion can be reached from the foregoing facts. It is very clear that the appellant has determined to set at naught the due process and orders of the courts of California, and does not intend to obey their mandate respecting the custody of the minor child. Under such circumstances she is not entitled to press her appeal to this court. By her appeal she is seeking the court's aid, and it is manifestly just and proper that in invoking that aid she should submit herself to all legitimate orders and processes. She cannot, with right or reason, ask the aid or assistance of this Court in hearing her demands, while she stands in an attitude of contempt to the legal orders and processes of the courts of this state, which she seeks to avoid through the intervention of an appeal to this tri-

bunal. *O'Neill v. Thomas Day Co.*, 152 Cal. 357, 362, 92 Pac. 876, 14 Ann. Cases 970."

The appeal was dismissed.

See also *Garrett v. Garrett* (Ill.) 173 N.E. 107; *Campbell v. Justices of Superior Court* (Mass.) 73 N.E. 659; *McEntire v. McEntire* (Ala.) 104 So. 804.

It seems to us that petitioner's brief involves the weighing of several values. There is the interest of petitioner in obtaining review of the money judgment against it, and the public interest in keeping the courts open for the administration of justice to all persons. There is the interest of respondents in the enforcement of their judgment and their right to its collection. There is the interest of the State of Washington in the discharge of its duty to secure due process of law to respondents, and its interest in the improvement of the quality of its justice by appellate procedures. There is the interest of the State in commanding respect for its orders and decrees so that its judicial machinery is effective and is not reduced to an apparent travesty. Weighing such values we submit that the action of the State Supreme Court can scarcely be condemned as unreasonable, arbitrary, thoughtless.

Petitioner's Conduct Constituted an Admission of Lack of Merit in Its Appeal

Petitioner has never given the State Court any reason whatever for refusal to comply with the order in supplemental proceedings, except to argue that the order is invalid. By its contemptuous conduct it has rendered a judgment of the Washington Court relatively meaningless. It has reduced an important case near-

ly to sham. It has to a substantial degree devitalized a judgment by contumacious dissipation of its own assets. It scarcely would do these things if it had faith in its appeal. The Washington Court was justified in accepting this conduct as a conclusive admission that petitioner's appeal had no merit. An implied admission arising from contemptuous conduct may be given effect, even to deny a hearing altogether, without violation of the Due Process Clause. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 53 L.Ed. 530, 29 S.Ct. 370; *Lawson v. Black Diamond Coal Mining Co.*, 44 Wash. 26, 86 Pac. 1120.

As it turned out, the appeal was later found to be without merit. Petitioner and Harris had joined their appeals and had joined in briefs (R. 50, 19, 21, 39). The appeal of Harris was separately docketed and argued (R. 52; *Arnold v. National Union, etc.*, 144 Wash. Dec. 165, 265 P.(2d) 1051). This argument was made from the joint briefs. The Supreme Court affirmed the judgment. *Arnold v. National Union of Marine Cooks and Stewards*, 144 Wash. Dec. 165, 265 P. (2d) 1051.

Petitioner Has Been Heard Upon Appeal

Respondents consented to dismissal of the case as to Harris, provided that judgment was preserved as to petitioner. This was proposed because Harris was without apparent assets and respondents believed the judgment valueless as against him. Harris refused this offer, and it became apparent to the Court that petitioner was using Harris as a stalking horse to prosecute an appeal from which petitioner was barred by its con-

tempt. Petitioner intimated as much by suggesting that the dismissal would be no more than a gesture because reversal upon the Harris appeal would inure to petitioner's benefit (R. 21). Leaving out of consideration any possible moral impact upon petitioner, salutary effects in other cases, and the possibility of Harris abandoning his appeal, which he did not do, petitioner was probably right. *LeFevre v. Fidelity and Deposit Company*, 9 Wn.(2d) 145, 113 P.(2d) 1014.

Petitioner and Harris had filed a joint brief upon joint appeals from the money judgment (R. 50, 19, 21, 39). At stages of this case petitioner has been separately represented. At other stages petitioner and Harris have been represented by the same attorneys. It will be noted that Mr. Caughlan filed a brief in the State Supreme Court May 15, 1952, as attorney for both appellants, petitioner and Harris (R. 17-23).

The Washington Supreme Court recognized that Harris had no conceivable interest to justify his further prosecution of the appeal, except the ulterior desire to aid petitioner:

> "At the time of the argument on the motion to dismiss the appeal of the union, respondents' counsel stated in open court that they have no desire to, and will not, enforce their judgment against Harris. They have since filed and argued a motion in this court asking us to remand the case to the superior court in order that they may have Harris dismissed, he having been a proper but not a necessary party. Harris has opposed the granting of that motion, which would free him from all liability on the judgment and would give him all the re-

lief he could possibly hope to secure by virtue of this appeal.

"It is apparent to this court that the real party in interest in this appeal is the union, which persists in its contemptuous refusal to obey the lawful order of the Superior Court for King County. We will, however, proceed to a consideration of this appeal on the merits, notwithstanding our feeling that the union and its agents are thereby getting a consideration to which they are not entitled." *Arnold v. National Union of Marine Cooks and Stewards,* 144 Wash. Dec. 165, 265 P.(2d) 1051.

Thus, petitioner has been heard through virtual representation.

Petitioner's Equal Protection Claim Is Not Before This Court

Petitioner's only mention of the Equal Protection Clause was made belatedly on June 13, 1952 (R. 26, at 28), and the nature of the claim then made was that petitioner's rights would be violated if, "without inquiring as to whether there was jurisdiction or justification for the Superior Court's adjudication, this Court should enter its own coercive order in contempt proceedings without receiving any evidence or conducting any hearing—without even making a determination as to whether the bonds to be transferred are, or have been, at any time material to this proceeding in the possession or control of either of appellants." This claim is not urged now and could not be because the State Supreme Court refused to act upon the motion for dismissal of the appeal until it had reviewed the contempt adjudication and affirmed it (R. 23-24).

We understand that "this Court will not pass upon any federal question not shown by the record to have been raised in the State Court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented." *People ex rel. Cohn v. Graves*, 300 U.S. 308, 81 L.Ed. 666, 57 S.Ct. 466. This rule has peculiar force when applied to review of state court decisions as to the validity of state legislation (*Wilson v. Cook*, 327 U.S. 474, 90 L.Ed. 793, 66 S.Ct. 663), and the same considerations enter here, where action of the highest Court of the State, governing a remedy in that Court, is under attack.

Petitioner Has Not Been Denied Equal Protection of Laws

We maintain that petitioner did not give the State Court an opportunity to consider its argument on this point because petitioner did not tender such an argument to the State Court. Additionally, there is no conceivable basis for inferring a denial of equal protection.

Petitioner has not been singled out for special treatment. There is no reason to suppose that other appellants who place themselves in petitioner's position will not be treated in the identical way that petitioner has been treated. It is not likely that a comparable situation will often arise, but there is no reason to assume that the Supreme Court of the State of Washington will apply a different set of rules to other litigants where the facts make applicable the rule of decision applied to petitioner.

The fact that most appellants do not forfeit their rights of appeal and are not denied such rights, does not show any inequality in operation of Washington law. Equal protection does not mean indiscriminate operation of laws, and persons in various relations may be variously treated. *Magoun v. Illinois Trust, etc., Bank*, 170 U.S. 283, 42 L.Ed. 1037, 18 S.Ct. 594. Things which are different in fact or opinion need not be treated as if they are the same. *Tigner v. Texas*, 310 U.S. 141, 84 L.Ed. 1124, 60 S.Ct. 879. The Clause means that the rights of all persons rest on the same rule under similar circumstances. *Hartford Steam Boiler Inspection and Insurance Co. v. Harris*, 301 U.S. 459, 81 L.Ed. 1223, 57 S.Ct. 838. The right to equal protection is not denied when the same law or course of procedure is applicable to all other persons under similar circumstances and conditions. *Tinsley v. Anderson*, 171 U.S. 108, 43 L.Ed. 91, 18 S.Ct. 805.

Petitioner seems to consider these cases inapplicable because they involved governmental actions quite different from the action of the Washington Supreme Court involved in the instant case (Reply Memorandum for Petitioner in Support of Its Petition for a Writ of Certiorari, pages 3 and 4). We, on the contrary, understand these statements to be statements of general principle applicable to all state action.

Petitioner's argument that it has been denied equal protection leads us to an ultimate conclusion that no litigant can be denied a procedural activity granted to other litigants, no matter how dissimilar their conduct may be. We contend that if there is a reasonable basis

for the distinction, one litigant may be accorded a procedural right denied to another. The whole question is whether the state has acted reasonably in drawing the line. Thus, the equal protection problem comes very close to the due process problem. The two safeguards may not always be interchangeable in discrimination cases (*Bolling v. Sharpe*, 347 U.S. 497, 98 L.Ed. (Advance, p. 591), 74 S.Ct. 693), but it would seem that here the action of the State Supreme Court was not violative of either guaranty unless it was arbitrary, and that if it was arbitrary it was violative of both.

Jurisdiction of the State Courts Over the Subject Matter of the Case

In a footnote at the end of its brief petitioner announces an intention to argue to the State Court that jurisdiction over the subject matter of the instant case was preempted by the Labor-Management Relations Act, 1947, 29 U.S.C.A. Sec. 141, *et seq.*, 61 Stat. 136, *et seq.* There would be no substance to such an argument. Neither the right nor the remedy created by the Act and applied by the National Labor Relations Board in *Pacific American Shipowners Association, et al.*, 98 NLRB 592, overlaps the instant case.

As appears in the decision of the Board, petitioner represented steward department employees of certain employers. The Board found that through the hiring arrangements maintained by those employers and petitioner, petitioner had the power to, and did, discriminate against a large number of such employees, including most of respondents.

The instant case is an action to recover damages for libel. It is further removed from the preempted field than *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 657, 98 L.Ed. (Advance, p. 686), 74 S.Ct. 833, because the loss of employment involved in the Board case, the injury for which the Federal Act provides monetary relief, is not involved in the tort action. Such loss of employment resulted from the illegal hiring practices established by petitioner and certain employers. It did not result from the publication of the libel, and could not enter into the assessment of damages in the libel action. In this respect the appendix to petitioner's brief is somewhat misleading because the juxtaposition of excerpts from the decision of the Board makes it seem that back pay was awarded because of the libelous publication, which was held to be a blacklist, violative of the Act. It is true that the publication was held to violate the Act, just as the activity of the union in *United Construction Workers v. Laburnum Construction Corp., supra*, was assumed by this Court to have violated the Act, but there was no back pay awarded for loss of earnings resulting from the blacklist.

In addition, the remedies do not overlap for the reason that no special damages were claimed by respondents in the libel suit (*Arnold v. National Union, etc.*, 36 Wn. (2d) 557, 219 P.(2d) 121), and the jury was instructed that it must not attempt to compute or award damages for specific loss of earnings, if any. This instruction is not in the record before this court, but it is the well established rule in Washington that there can be no recov-

ery of particular items of damage where there is an allegation only of general damage. *King v. King*, 83 Wash. 615, 145 Pac. 971; *Woodward v. Blanchett*, 36 Wn.(2d) 27, 216 P.(2d) 228. The only monetary award by the Board was for specific pay loss.

The argument suggested by petitioner has never been intimated to the State Courts although petitioner filed in the State Supreme Court a brief of 316 pages, not counting an appendix of 61 pages. If the point was thereafter suggested by *Garner v. Teamsters, etc., Union*, 346 U.S. 485, 98 L.Ed. (Advance, p. 161), 74 S.Ct. 161, and *Capital Service, Inc., v. N.L.R.B.*, 347 U.S. 501, 98 L.Ed. (Advance, p. 594), 74 S.Ct. 699, any doubt as to State Court jurisdiction arising from those cases is completely removed by *United Construction Workers v. Laburnum Construction Corp., supra*, so that the argument now has less color than it would have had before *Garner*.

CONCLUSION

Respondents ask that the judgment of the Supreme Court of the State of Washington be affirmed.

Respectfully submitted,

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